

13:04:28

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3

4

5 - - - - - X  
UNITED STATES OF AMERICA )

22CR6009

6

vs.

Rochester, New York

7

JOHN DOUGLAS LOONEY,

)

May 8, 2023

8

Defendant.

1:00 p.m.

- - - - - X

9

**ORAL ARGUMENT**

10

11 TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE MARK W. PEDERSEN  
12 UNITED STATES MAGISTRATE JUDGE

12

13 JAMES P. KENNEDY, JR., ESQ.

United States Attorney

13

14 BY: MEGHAN MCGUIRE, ESQ.

Assistant United States Attorney

14

100 State Street

15

Rochester, New York 14614

16

17 JAMES A. NAPIER, ESQ.

Napier &amp; Napier

17

16 West Main Street, Suite 700

18

Rochester, NY 14614

19

20

21

22

23

**COURT REPORTER: Karen J. Clark, Official Court Reporter**  
**Karenclark1013@AOL.com**

24

**100 State Street**

25

**Rochester, New York 14614**

1 USA V. J. LOONEY

2 P R O C E E D I N G

3 \* \* \*

4

13:06:40 5 THE CLERK: We're on the record, this is  
13:06:41 6 case No. 22CR6009, United States versus John Douglas  
13:06:48 7 Looney.

13:06:49 8 MAGISTRATE JUDGE PEDERSEN: Sir, you are  
13:06:52 9 John Looney?

13:06:54 10 THE DEFENDANT: Yes.

13:06:54 11 MAGISTRATE JUDGE PEDERSEN: You're appearing  
13:06:55 12 here with your attorney, Mr. Napier?

13:06:57 13 THE DEFENDANT: Yes.

13:06:58 14 MAGISTRATE JUDGE PEDERSEN: This was  
13:06:59 15 originally scheduled for an evidentiary hearing, but I  
13:07:05 16 think we're going to go with an oral argument instead.

13:07:08 17 Is that your understanding, Ms. McGuire?

13:07:10 18 MS. MCGUIRE: That was my understanding.

13:07:12 19 MAGISTRATE JUDGE PEDERSEN: And Mr. Napier?

13:07:13 20 MR. NAPIER: That is my understanding as  
13:07:18 21 well, your Honor.

13:07:22 22 MAGISTRATE JUDGE PEDERSEN: It seems we have  
13:07:23 23 a difference of opinion on how Freenet works between Mr.  
13:07:30 24 Levine's theory and the theories that you brought forth,  
13:07:35 25 Mr. Napier. One is that it has an even-share model,

1 USA V. J. LOONEY

13:07:42 2 meaning that a requester machine sends out an even  
13:07:48 3 amount of requests, roughly even, to all of its peers.  
13:07:52 4 And then the other is that it favors one or the other  
13:07:58 5 peer. And then there is also the friend of a friend  
13:08:01 6 sharing that further fragments the request.

13:08:07 7 So, Mr. Napier, why don't I have you explain  
13:08:11 8 first why you believe that Freenet is not operating the  
13:08:15 9 way that Mr. Levine posited in his paper.

13:08:21 10 MR. NAPIER: Okay, your Honor. I submit,  
13:08:24 11 Judge, that there is no one besides the government in  
13:08:30 12 its affidavit is maintaining, and by no one I mean not  
13:08:35 13 the Freenet developers, not other academic papers that  
13:08:40 14 are peer reviewed, I believe, that requests for bits of  
13:08:46 15 a file on Freenet are distributed roughly evenly or by  
13:08:52 16 even share. As my last written submission to you  
13:08:57 17 indicated, your Honor, the Freenet developers in their  
13:09:01 18 August -- in an August 2022 article, stated that  
13:09:06 19 everything about the Levine approach was wrong. And I  
13:09:12 20 don't think it's an exaggeration, as far as that article  
13:09:16 21 is concerned, that everything that they maintain the  
13:09:19 22 developers of the Freenet network maintain that  
13:09:22 23 everything regarding the Levine method is wrong. I'll  
13:09:28 24 just quote a little bit of that article. It was written  
13:09:32 25 in August of '22, "In April of 2020" -- this is a quote

1 USA V. J. LOONEY

13:09:37 2 -- "In April of 2020, the approach by Levine to track  
13:09:41 3 down loaders," which is the fundamental issue as to this  
13:09:46 4 case, "was proven to be wrong. Their false positive  
13:09:52 5 rates is wrong. Their math is wrong and their model is  
13:09:56 6 wrong. Therefore, the results you get when using their  
13:09:59 7 method are false. Yet this approach is still used two  
13:10:03 8 years later to get warrants against Freenet users."

13:10:09 9 Quite frankly, your Honor, that is, as I  
13:10:14 10 say, there has been other academic papers that we've  
13:10:17 11 submitted that says Freenet does not distribute their  
13:10:20 12 request in a roughly even way.

13:10:23 13 I submitted a case, your Honor, and I  
13:10:26 14 concede there is some confusion as to where this case  
13:10:31 15 came from, so-called New York City case. But I do think  
13:10:35 16 it's important. We had a -- we have a warrant for a  
13:10:41 17 computer in connection with this case. It's *United*  
13:10:49 18 *States v. James Corbett*, C-o-r-b-e-t-t. And it was out  
13:10:59 19 of the Southern District of New York. And we compared  
13:11:02 20 the warrant with the IP, the warrant in the IP address,  
13:11:07 21 and, excuse me, and the chart, if you will, that I have,  
13:11:11 22 and as it was included as one of the exhibits. And what  
13:11:16 23 that shows, Judge, is that, in that particular case, as  
13:11:21 24 far as the files of interest that the suspected  
13:11:25 25 downloader had requested, bits of that file to law

1 USA V. J. LOONEY

13:11:34 2 enforcement -- and I'm going to go through each of these  
13:11:36 3 files, if I may, because I think it proves each of the  
13:11:40 4 points. Where there was requested by the FBI in the  
13:11:44 5 first file of interest from this chart -- sorry --

13:11:55 6 MAGISTRATE JUDGE PEDERSEN: Is this the case  
13:11:57 7 that you gave me a copy of warrant 20MAH669?

13:12:52 8 MR. NAPIER: I'm sorry, your Honor. So,  
13:12:54 9 again, in that particular case, we ran one file of  
13:12:57 10 interest. There was four law enforcement nodes, FBI  
13:13:01 11 nodes, that were connected, directly connected to the  
13:13:05 12 suspected downloader. And it indicated in the charge  
13:13:09 13 that the expected number of requests on the first file  
13:13:13 14 of interest were 27, 28, 27, 27. And the requests  
13:13:20 15 received by the four different respective law  
13:13:26 16 enforcement nodes were 29, 11, 10 and 17.

13:13:30 17 In this particular case, all we've been  
13:13:32 18 given information, in the Looney case, all we've been  
13:13:36 19 given information about is one FBI node connected to Mr.  
13:13:40 20 Looney's computer. We don't know if there was other FBI  
13:13:44 21 nodes connected to Mr. Looney's computer. And,  
13:13:50 22 therefore, we don't know if the number of requests  
13:13:55 23 received would have been different and not roughly  
13:14:00 24 evenly to any other FBI nodes as it was in this New York  
13:14:06 25 City *James Corbett* case. So, that is the first file of

USA V. J. LOONEY

interest, the request received from the four respective different FBI nodes, but all connected to the suspected downloaders were 29, 11, 10 and 17.

Regarding the next file of interest, the expected number request under this even-share method was 50. And the request received were 42 and 4. And, again, from two different respective FBI connected nodes. Obviously, your Honor, I'm not a math genius, but 42 and 4 are not roughly even.

And the last file of interest where it was expected number of request was 24, the four law enforcement nodes received request from the suspected downloader of 25, 12, 5, and 19. So, your Honor, I think that that is pretty clear evidence that requests to a connected node are not distributed roughly evenly.

And Dr. Brian Levine, who, I submit, is not even though it is not directly referred to in the affidavit, was the creator of the formula or the method that was used to determine who a downloader is and the even-share methodology, he concedes that actually routing requests are done by what is called a friend-of-a-friend routing. And the key point of friend-of-a-friend routing, which we believe the evidence is overwhelming that that is actually how

1 USA V. J. LOONEY

13:16:02 2 requests of bits of a file on Freenet are requested is  
13:16:07 3 that friend-of-a-friend routing does not allow for an  
13:16:09 4 expected number of bits of a file to be received if one  
13:16:14 5 is the downloader, and, therefore, it can provide no  
13:16:19 6 probable cause to believe that this person is, in fact,  
13:16:22 7 the downloader.

13:16:25 8 I, briefly, your Honor, I know your Honor  
13:16:28 9 has been given a lot of material on these issues, but  
13:16:33 10 I'd appreciate the Court's indulgence by reading a bit  
13:16:38 11 more on friend-of-a-friend routing.

13:16:42 12 Freenet, we submit to you, Judge, that  
13:16:46 13 Freenet uses FOAF, friend-of-a-friend routing, and some  
13:16:53 14 of this has been submitted, but it's important for my  
13:16:56 15 argument, if I may. Freenet uses FOAF,  
13:17:00 16 friend-of-a-friend routing, where an FOAF node is simply  
13:17:02 17 a peer of a peer of a peer of a node. It's simply  
13:17:06 18 wording, it's not to imply that the actual user knows  
13:17:10 19 the FOAF. In reality, every request has an inherent  
13:17:16 20 ideal location, not geographic, which it is routed for.  
13:17:18 21 Nodes route requests by giving them to the peer whose  
13:17:22 22 location is closest to that ideal location. The  
13:17:25 23 location is a number between zero point zero and one  
13:17:28 24 point zero calculated from the hash value.

13:17:31 25 I think I've submitted, as far as how

USA V. J. LOONEY

Freenet works, more detailed information regarding friend-of-a-friend routing, but what we're asking for at the end of the day, at the end of the argument is for an evidentiary hearing, which Officer Turner would be required to testify to explore these issues. Again, the key part being that we do not believe, and more important than we, as in John and I, the Freenet developers, the academic papers, Dr. Brian Levine, himself, when he refers to routing is done by way of friend of a friend, and we believe that the proof is very strong, if not overwhelming, that it cannot be determined through friend-of-a-friend routing who the downloader is of a particular file. It can be determined through even share if that was the methodology that was used by Freenet. But, Judge, I can go so far as to say that I believe it's conclusive that Freenet does not use even share or roughly distributed, requests being roughly distributed evenly.

So, Judge, to answer your question, at this time, as far as a why do we believe that requests are not distributed roughly evenly, it's Dr. Levine himself refers to requests being distributed by way of friend of a friend. That the New York City case shows wildly dispirit number of requests received by the FBI from the



1 USA V. J. LOONEY

13:19:23 2 same suspected connected node. There is no intermediary  
13:19:27 3 node between the suspected node and the FBI in those  
13:19:29 4 cases. In other words, they all should have received  
13:19:32 5 roughly the same amount of requests and they did not.  
13:19:34 6 And for those reasons, your Honor, we believe that the  
13:19:38 7 proof is very strong that requests are not distributed  
13:19:45 8 by even share and are, in fact, distributed by friend of  
13:19:53 9 a friend, which does not allow for a determination as to  
13:19:56 10 an expected number of requests which could be used to  
13:20:00 11 determine probable cause.

13:20:01 12 MAGISTRATE JUDGE PEDERSEN: Is this case  
13:20:04 13 that we're in here --

13:20:05 14 MR. NAPIER: Yes.

13:20:05 15 MAGISTRATE JUDGE PEDERSEN: -- also an open  
13:20:07 16 net case or is it a dark net, I think was the term?

13:20:12 17 MS. MCGUIRE: Open net, your Honor.

13:20:13 18 MR. NAPIER: I believe it is an open net.  
13:20:16 19 This case, the Looney case, your Honor.

13:20:19 20 MAGISTRATE JUDGE PEDERSEN: Yes.

13:20:19 21 MR. NAPIER: That is an open net case, your  
13:20:21 22 Honor.

13:20:21 23 MAGISTRATE JUDGE PEDERSEN: The same is true  
13:20:22 24 of the New York City case that you presented?

13:20:24 25 MS. MCGUIRE: Yes, your Honor.

1 USA V. J. LOONEY

13:20:25 2 MAGISTRATE JUDGE PEDERSEN: Thank you.

13:20:27 3 Ms. McGuire.

13:20:28 4 MS. MCGUIRE: Your Honor, just to touch on  
13:20:29 5 the New York City case. I'm not really sure what the  
13:20:33 6 source of this printout is, but assuming it's accurate  
13:20:36 7 and unaltered, I would point out that in that warrant,  
13:20:41 8 the Levine method was used to obtain a warrant based on  
13:20:46 9 probable cause to search the devices at that location.  
13:20:49 10 The resulting case is *U.S. v. Corbett*, 20CR525. Child  
13:20:55 11 pornography was found at that home, and that defendant  
13:20:58 12 subsequently pled guilty to possession of child  
13:21:01 13 pornography. So, what that case shows is that another  
13:21:05 14 instance in which the use of this formula to predict who  
13:21:10 15 is requesting downloads of child pornography worked.  
13:21:13 16 There is nothing in the defendant's submissions or in  
13:21:15 17 anything I'm aware of and certainly nothing that Officer  
13:21:19 18 Turner was aware of before he signed the application  
13:21:21 19 that shows that this formula does not work. And I think  
13:21:24 20 the fundamental thing where we're talking past each  
13:21:28 21 other here is the difference between theory and  
13:21:30 22 application. The Freenet developers developed a system  
13:21:35 23 where they were attempting to come up with a very  
13:21:38 24 complicated routing system for requests. The resulting  
13:21:42 25 network, Freenet, operates differently in practice than

USA V. J. LOONEY

1  
2 what they had hoped and intended. And that is what Dr.  
3 Levine studied. How it actually works in practice, not  
4 in theory. And what he found in practice is that if you  
5 model it as roughly even distribution, you can  
6 accurately predict whether or not someone is requesting  
7 a file to download. So there is nothing in anything  
8 that the defense has submitted that suggests, first,  
9 that the formula doesn't work. I don't think we've seen  
10 a single case where this formula inaccurately predicts  
11 who the requester is. And even a single case wouldn't  
12 be enough to overcome probable cause, just probable  
13 cause. There is not a single article that undermines  
14 the formula to make those predictions. And, in fact, a  
15 number of the articles that the defense themselves cited  
16 explain ways in which Freenet does not operate in the  
17 manner that its creators intended.

18 So, for example, if you look at the article  
19 they submitted, "Measuring Freenet in the Wild," you can  
20 show -- you can see that this article explains how  
21 Freenet does not operate as quickly or as efficiently as  
22 designed, and is not meeting its designers'  
23 expectations. And the exhibits long delays, frequent  
24 routing factors, involve adequate user models to predict  
25 activity. They cited a trace back attack on Freenet.

1 USA V. J. LOONEY

13:23:21 2 And this article says right in the article, "The  
13:23:24 3 originating machine of a request message can be  
13:23:30 4 identified." And cites how the operation is different  
13:23:33 5 than the theories that came up with by the developers,  
13:23:36 6 and, therefore, does allow for routing.

13:23:39 7 Dr. Levine has tested this, that was in the  
13:23:42 8 affidavit that Officer Turner submitted. He has placed  
13:23:46 9 it in practice. And law enforcement has used it  
13:23:48 10 throughout the country. And there is not a single piece  
13:23:51 11 of the evidence here that has been proffered here or  
13:23:54 12 that would be offered at a hearing to undermine its  
13:23:54 13 effectiveness or, more importantly, to show that  
13:24:00 14 anything that Officer Turner put in his affidavit was  
13:24:02 15 knowing or intentionally false.

13:24:05 16 MAGISTRATE JUDGE PEDERSEN: So, is there a  
13:24:07 17 question of fact about how Freenet operates that needs  
13:24:12 18 to be explored?

13:24:13 19 MS. MCGUIRE: Judge, I don't think there has  
13:24:15 20 been any issue of fact or proffer of what proof will be  
13:24:18 21 shown to show that Freenet operates in practice in any  
13:24:22 22 way other than how the government has said it did. If  
13:24:25 23 the government went to a hearing, we would call Dr.  
13:24:29 24 Levine. He would say everything that I've just said.  
13:24:32 25 Who would the defense call?

1 USA V. J. LOONEY

13:24:35 2 MAGISTRATE JUDGE PEDERSEN: The New York  
13:24:36 3 City case was *Corbett*, 20MAH669, that is the paper I  
13:24:43 4 have.

13:24:44 5 MS. MCGUIRE: That is the search warrant  
13:24:48 6 magistrate number.

13:24:48 7 MAGISTRATE JUDGE PEDERSEN: Yes. And became  
13:24:51 8 20CR525 in the Southern District.

13:24:55 9 MR. NAPIER: Correct.

13:24:55 10 MAGISTRATE JUDGE PEDERSEN: And has attached  
13:24:57 11 a color printout called a "Freenet Target Summary." And  
13:25:01 12 in that --

13:25:06 13 MS. MCGUIRE: No, I didn't have that.

13:25:07 14 MAGISTRATE JUDGE PEDERSEN: It's contended  
13:25:08 15 that law enforcement had more than one machine that was  
13:25:12 16 connected to the suspect's machine. And the number of  
13:25:19 17 requests coming across are different, if I'm reading  
13:25:25 18 this correctly. But I don't understand what the  
13:25:29 19 statistical test result is, Mr. Napier, where it says  
13:25:34 20 "pass, pass, pass."

13:25:35 21 MS. MCGUIRE: Your Honor, that means,  
13:25:36 22 according to the formula, it's more likely than not that  
13:25:39 23 the individual computer is requesting a file.

13:25:42 24 MR. NAPIER: And, your Honor, I would note  
13:25:44 25 that what they did there is that they took the greatest

1 USA V. J. LOONEY

13:25:50 2 number of requests that any given connected FBI node  
13:25:56 3 received and indicated statistical test result "pass"  
13:26:03 4 when they were very different -- there were a very  
13:26:08 5 different number of requests, as the Court can easily  
13:26:11 6 see. From 10 to 29 in the first file of interest. From  
13:26:16 7 4 to 42 in the second file of interest. And then from 5  
13:26:18 8 to 25 in the third file of interest.

13:26:23 9 MS. MCGUIRE: Although, your Honor, I would  
13:26:25 10 point out, when we say "even," we say "roughly even"  
13:26:28 11 every time, we're talking in factors of 10 and 100.  
13:26:32 12 We're talking about multiple divisions. So, roughly  
13:26:36 13 even within a factor of 10, all of these would be  
13:26:39 14 roughly even when you're talking that large of a number.

13:26:43 15 MR. NAPIER: Your Honor, I would have to  
13:26:44 16 push back on that. And in terms of total unique  
13:26:47 17 requests log and the first file of interest it says 76,  
13:26:54 18 and one FBI node received 29, one received 11, one  
13:26:59 19 received 10 and one received 17, that those are not  
13:27:04 20 close to roughly even.

13:27:04 21 MS. MCGUIRE: That is the total column.

13:27:06 22 MR. NAPIER: Right. If I could just  
13:27:09 23 continue, please.

13:27:09 24 MS. MCGUIRE: I'm sorry.

13:27:10 25 MR. NAPIER: And then the total unique

1 USA V. J. LOONEY

13:27:12 2 request log in the file interest No. 42 was 46. And law  
13:27:17 3 enforcement received the two respective nodes received  
13:27:22 4 42 and 4. I'm sorry. I don't see how there can be a  
13:27:26 5 credible argument that those are roughly even number of  
13:27:31 6 requests with the last one being total unique requests  
13:27:35 7 log 78 and between 5, 12, 19 and 25. I haven't done the  
13:27:43 8 percentages on each of those numbers of request, but  
13:27:46 9 they don't seem roughly evenly to me.

13:27:49 10 MS. MCGUIRE: Again, when you're talking  
13:27:51 11 about factors of 10, it is roughly even. This is the  
13:27:55 12 Levine formula accurately predicting there would be CP  
13:27:58 13 at this location where this warrant was executed. And I  
13:28:01 14 also point out this warrant was signed almost two years  
13:28:04 15 after Officer Turner's warrant, so I don't even see this  
13:28:08 16 would be admissible or relevant in a suppression  
13:28:12 17 hearing.

13:28:13 18 So, again, I just go back to, if we had a  
13:28:16 19 hearing, the government would call Dr. Levine, and he  
13:28:19 20 would say everything that we proffered. Who or what  
13:28:23 21 would the defense offer as rebuttal? Because they are  
13:28:28 22 only entitled to a hearing if there is sufficient  
13:28:31 23 evidence of proof that they are going to proof put on  
13:28:34 24 about. What would that be? What is the proof there.

13:28:37 25 MR. NAPIER: I think as the Freenet, a core

USA V. J. LOONEY

part of the government's argument was that the Levine method works was there was so-called 97 percent, 97 percent rate that of not being a false positive. In other words, that there was 2.3 percent of false positives rate. And, again, the Freenet developers in their '22 argument, in the '22 article say that is a wrong false positive rate. The quoting from that article, "The four pillars of the detection they name is this claim of 2.3 percent false positive rate, but this claim is wrong because they only reach it through many false assumptions."

That is the factual dispute we're having with the government regarding claims that were made regarding 97 percent showing, and only a 2 percent showing of a false positive rates that the article continues, more technical in detail, they ignore the friend-of-a-friend routing breaks their method when an intermediary node or the observing node contains many connections, which is not the rare case but the normal case. They assume they only get a false positive if the request for a given file reached them with both HTL or Hops 18 or HTL 16 and HTL 16 and HTL 17. But the routing algorithm causes them to almost always receive requests from a given node over the same route. So they



1 USA V. J. LOONEY

13:30:15 2 will have the same HTL regardless of the number of hops  
13:30:20 3 over a given node.

13:30:20 4 MAGISTRATE JUDGE PEDERSEN: Mr. Napier, let  
13:30:22 5 me interrupt you for a moment.

13:30:25 6 That?

13:30:26 7 MR. NAPIER: Yes, that is included. We did  
13:30:29 8 send that.

13:30:30 9 MAGISTRATE JUDGE PEDERSEN: What is the  
13:30:31 10 source of this document entitled "How Freenet Works,"  
13:30:34 11 and it starts out, "The affidavit by Officer Turner  
13:30:37 12 describes."

13:30:38 13 MR. NAPIER: Yes. Yes. Your Honor, that is  
13:30:45 14 a document that I put together quoting, well, for  
13:30:54 15 instance, quoting Dr. Brian Levine. As far as in the  
13:30:59 16 third paragraph of that document, he states, "When  
13:31:02 17 sending a request, a node attempts to send it in the  
13:31:06 18 direction of the node closest to the block's location.  
13:31:08 19 Freenet performs friend-of-a-friend routing." That is  
13:31:14 20 their admitted expert who says that Freenet performs  
13:31:23 21 friend-of-a-friend routing, which is not even share.

13:31:25 22 MS. MCGUIRE: So, your Honor, this is a copy  
13:31:27 23 and paste from a printout from the internet. I don't  
13:31:30 24 think the Court should give it any weight. Is a Freenet  
13:31:34 25 developer coming to testify to these allegations to say

1 USA V. J. LOONEY

13:31:37 2 we've tested the formula and it doesn't work? We've  
13:31:39 3 tested how Freenet actually operates and that is not how  
13:31:43 4 it operated? Is that what the defense is proposing for  
13:31:47 5 a hearing?

13:31:48 6 MR. NAPIER: Well, your Honor, we would  
13:31:50 7 accept Dr. Levine testifying, I think the government had  
13:31:53 8 proffered the possibility of having to produce Dr.  
13:31:56 9 Levine, and cross examining Dr. Levine regarding things  
13:32:01 10 that he has written to determine how Freenet operates.

13:32:08 11 MAGISTRATE JUDGE PEDERSEN: So, you're  
13:32:09 12 saying that Dr. Levine has undermined his own theory.

13:32:12 13 MR. NAPIER: Well, I'm submitting, your  
13:32:19 14 Honor, that Freenet, when Dr. Levine in both his 2017  
13:32:22 15 and 2020 academic papers, states that "Freenet performs  
13:32:30 16 friend-of-a-friend routing," that is a quote from both  
13:32:32 17 of those papers, that that is contrary to the  
13:32:36 18 government's affidavit which never refers to  
13:32:40 19 "friend-of-a-friend routing" at any point in however  
13:32:45 20 many pages that affidavit was. And there are numerous  
13:32:50 21 descriptions of even share routing in that affidavit.

13:32:58 22 MS. MCGUIRE: Actually, your Honor, it  
13:33:03 23 doesn't. It says "roughly distributed evenly."

13:33:04 24 MR. NAPIER: Right, which I believe to be  
13:33:07 25 synonymous.

1 USA V. J. LOONEY

13:33:08 2 MAGISTRATE JUDGE PEDERSEN: Okay. Is there  
13:33:11 3 an authority, someone who has experimented that has come  
13:33:17 4 up with the conclusion that Dr. Levine's theory is  
13:33:19 5 wrong? I know that there is push back by the developers  
13:33:25 6 of Freenet, but, as Ms. McGuire points out, there is  
13:33:28 7 theory and then there is practical operation. It  
13:33:32 8 appears that Dr. Levine did his on the practical  
13:33:38 9 operation.

13:33:39 10 MR. NAPIER: Right. Judge, I think what was  
13:33:41 11 also -- I will come back to that, but, before I forgot,  
13:33:46 12 I think, and this was also, I believe, submitted to the  
13:33:50 13 Court as far as the formula that Dr. Levine created, and  
13:33:58 14 the formula is referred to 18 different times, although  
13:34:02 15 never shown in the affidavit as to what the formula was.  
13:34:05 16 And the formula was, according to the Freenet  
13:34:12 17 developers, the formula was changed in 2020. This is  
13:34:18 18 the formula that is apparently that is used to determine  
13:34:21 19 who a downloader is.

13:34:23 20 And, Judge, nolo contendere, I don't  
13:34:27 21 understand. I show the formula to the Court is pretty  
13:34:32 22 lengthy and I think submitted to the Court by us, but I  
13:34:36 23 have no idea what it says, to be honest with you. And  
13:34:40 24 the government, although we refer to the formula, like  
13:34:44 25 the Wizard of Oz, it is not described at all how it is

1 USA V. J. LOONEY

13:34:49 2 that that formula determines who, more likely than not,  
13:34:56 3 is the downloader of a particular file.

13:35:04 4 Judge, we would, albeit perhaps as late in  
13:35:08 5 the day, but if the Court were to grant a hearing in  
13:35:13 6 which the people would have, presumably, Dr. Levine  
13:35:19 7 testify, we have been in contact with one of the  
13:35:24 8 developers of Freenet, and there is a possibility that  
13:35:28 9 we could produce that developer, who we believe would  
13:35:34 10 say that, well, again, as Dr. Levine himself said, for  
13:35:40 11 one thing, friend-of-a-friend routing is the way  
13:35:43 12 requests are distributed. And that it is not done  
13:35:48 13 through even share, and, therefore, it's impossible to  
13:35:55 14 determine an expected number of requests leading to  
13:35:58 15 probable cause.

13:36:00 16 MS. MCGUIRE: And just to clarify, Judge. I  
13:36:02 17 think we agree on his first point and diverge on the  
13:36:06 18 second, right? Friend-of-a-friend routing is the  
13:36:08 19 design. The question is whether or not Dr. Levine  
13:36:10 20 created a model that accurately predicts how that design  
13:36:14 21 works in practice. And he designed the model, he tested  
13:36:17 22 the model, he got a 98 percent positive rate, 2 percent  
13:36:22 23 false positive rate. And on top of that, law  
13:36:25 24 enforcement has been using this model in practice  
13:36:28 25 successfully throughout the country, and we have yet to

1 USA V. J. LOONEY

13:36:31 2 hear a single example of it not working. We don't have  
13:36:35 3 a single study saying this formula does not work. We  
13:36:39 4 don't have a single example of a time when it didn't  
13:36:42 5 work. All we have is maybe we'll call one of the  
13:36:46 6 developers that will say, A, the thing we all agree on,  
13:36:48 7 there was a specific way this was designed to work; and  
13:36:51 8 then, B, it can't possibly predict who a requester is,  
13:36:58 9 which we've already proven it's false because we do  
13:37:02 10 predict who it is as in this case.

13:37:06 11 MR. NAPIER: We are referring to the  
13:37:08 12 methodology. Quite frankly, I think this is the first  
13:37:10 13 time I've heard the government say, I don't want to  
13:37:13 14 misstate what you said, but that the method used to  
13:37:18 15 distribute requests is friend-of-a-friend routing.  
13:37:21 16 Again, that is not referred to at all in the affidavit.  
13:37:27 17 The government is now saying, I believe the government  
13:37:30 18 is saying Freenet does employ friend-of-a-friend  
13:37:35 19 routing, but their even share model is valid in  
13:37:40 20 determining who a downloader is. And I submit, your  
13:37:47 21 Honor, that that is a factual dispute that requires an  
13:37:52 22 evidentiary hearing.

13:37:54 23 MS. MCGUIRE: But what is the import of that  
13:37:56 24 factual dispute? The only question is whether or not  
13:37:59 25 this methodology establishes probable cause. The

1 USA V. J. LOONEY

13:38:03 2 question is whether or not this method, more likely than  
13:38:06 3 not, predicts who a requester is. And the only evidence  
13:38:10 4 in front of the Court and even multiple chances to  
13:38:14 5 proffer today, is that it does. There is no issue of  
13:38:18 6 fact.

13:38:18 7 And, on top of that, in light of *Leon*, there  
13:38:21 8 is no way there will be ever any testimony that Officer  
13:38:27 9 Turner had any reason to believe that this was anything  
13:38:29 10 other than a reliable method of identifying a requester  
13:38:37 11 of child pornography.

13:38:38 12 MR. NAPIER: And, Judge, that may be the  
13:38:40 13 case, but we don't know that to be true in terms of  
13:38:43 14 Officer Turner's basis for knowledge. The *Franks* case  
13:38:49 15 does talk about reckless disregard for the truth. And  
13:38:52 16 we say that Levine himself says that requests are  
13:38:56 17 distributed by way of friend-of-a-friend routing both in  
13:38:59 18 2017 and in 2020, that, well, quite frankly, I think  
13:39:05 19 that that is something that Officer Turner should have  
13:39:07 20 been aware of. And if he was aware of it, why didn't he  
13:39:13 21 refer to that in the affidavit?

13:39:16 22 MS. MCGUIRE: Your Honor, that is pure  
13:39:18 23 speculation and speculation is not the basis for a  
13:39:21 24 *Franks* hearing. And, again, I feel like we're talking  
13:39:24 25 in circles. No one is disagreeing with how the

1 USA V. J. LOONEY

13:39:29 2 designers hoped things would work. But the affidavit  
13:39:32 3 doesn't talk about the design intentions. It talks  
13:39:36 4 about how things work in practice on the network and  
13:39:38 5 ways you can use to predict who a user is. And they are  
13:39:43 6 completely different things. And the former was not  
13:39:45 7 brought up in the affidavit, only the latter. How that  
13:39:48 8 network works in a practice and how this formula is used  
13:39:52 9 to predict the requester.

13:39:52 10 MR. NAPIER: Judge, if I may, how it works  
13:39:54 11 in practice, there is the New York City case, and I  
13:39:56 12 heard the government say that they believe the New York  
13:39:59 13 City case with those numbers and assuming they are  
13:40:02 14 accurate as far as the requests received, that those are  
13:40:07 15 roughly evenly distributed. And they clearly, to me, do  
13:40:13 16 not appear to be roughly evenly distributed.

13:40:17 17 MAGISTRATE JUDGE PEDERSEN: They also said  
13:40:19 18 they were roughly even if you looked at it in a factor  
13:40:23 19 of 10.

13:40:24 20 MS. MCGUIRE: And the numbers were placed in  
13:40:26 21 the formula. The formula said this is probably a  
13:40:29 22 requester, that is why the search warrant was occurred  
13:40:35 23 and they ultimately found child pornography.

13:40:37 24 MR. NAPIER: But, again, how it works  
13:40:38 25 practically, if the only law enforcement node connected

1 USA V. J. LOONEY

13:40:40 2 was the one that was received in any particular file,  
13:40:45 3 they would not have had a basis to get a warrant in that  
13:40:49 4 particular case. As far as how it works practically,  
13:40:53 5 I'm repeating myself now, Judge, if that was the only  
13:40:57 6 law enforcement node connected, I would submit, under  
13:41:01 7 their own model, they would not be able to justify a  
13:41:04 8 warrant being issued because they would not have  
13:41:07 9 probable cause under -- given that they expected to  
13:41:11 10 receive so many more requests if this was the  
13:41:15 11 downloader.

13:41:16 12 MS. MCGUIRE: Right. That is the formula.

13:41:18 13 MAGISTRATE JUDGE PEDERSEN: I appreciate  
13:41:19 14 that. And I'm glad I don't have to decide that  
13:41:21 15 particular issue. In this case, there was one police  
13:41:24 16 node connected, correct?

13:41:26 17 MS. MCGUIRE: Yes.

13:41:28 18 MAGISTRATE JUDGE PEDERSEN: It says "open  
13:41:28 19 share." And based on the requests that node received in  
13:41:32 20 applying the formula Dr. Levine posited, they predicted  
13:41:40 21 that the requester was Mr. Looney.

13:41:42 22 MS. MCGUIRE: That's correct.

13:41:43 23 MAGISTRATE JUDGE PEDERSEN: Okay. Is there  
13:41:44 24 some evidence, some affidavit, some peer reviewed paper  
13:41:53 25 that tells me the method used for this particular case



1 USA V. J. LOONEY

13:42:00 2 was inaccurate, could not have predicted the outcome  
13:42:04 3 here? I'm trying to see if there is an issue of fact  
13:42:10 4 that has been brought to my attention that requires a  
13:42:13 5 hearing. I could ask for a hearing, but if all we have  
13:42:17 6 is the government bringing in Dr. Levine and cross  
13:42:21 7 examining Dr. Levine, I don't see where we have two  
13:42:24 8 sides against the middle. But are you saying that it's  
13:42:28 9 enough just to cross examine the government's witness?

13:42:34 10 MR. NAPIER: I think it may be, your Honor.  
13:42:37 11 Again, we submit to you that the formula as the Freenet  
13:42:43 12 developers maintain and the method used by Dr. Levine is  
13:42:52 13 not how requests are distributed; that it's a false  
13:42:56 14 method.

13:42:57 15 MAGISTRATE JUDGE PEDERSEN: Right. But you  
13:42:59 16 have not done any experimentation yourself to make that  
13:43:04 17 conclusion.

13:43:04 18 MR. NAPIER: True, true.

13:43:06 19 MAGISTRATE JUDGE PEDERSEN: You're basing  
13:43:06 20 that on what?

13:43:11 21 MR. NAPIER: Well, we're basing it on --  
13:43:19 22 we're not aware of anyone, other than Levine himself,  
13:43:26 23 saying, and in the government's affidavit saying that  
13:43:30 24 requests are distributed roughly evenly, and that even  
13:43:35 25 share can be used as a valid method for determining who

1 USA V. J. LOONEY

13:43:40 2 a downloader is other than Levine himself. And I  
13:43:49 3 submit, your Honor, given the contradiction, as far as  
13:43:54 4 how requests are actually distributed, that that calls  
13:44:01 5 for an evidentiary hearing.

13:44:03 6 MAGISTRATE JUDGE PEDERSEN: What if Dr.  
13:44:05 7 Levine came in here and testified, yeah, I know Freenet  
13:44:08 8 was designed to make the identification of the requester  
13:44:13 9 impossible to learn, but my experiment shows that is not  
13:44:19 10 the case. And even with the current method it uses for  
13:44:24 11 routing requests, my formula still works.

13:44:27 12 You could cross examine him over and over  
13:44:29 13 again, but who would you have to contradict him other  
13:44:33 14 than your own suppositions?

13:44:35 15 MR. NAPIER: Well, your Honor, I would like  
13:44:37 16 an opportunity to see if a Freenet developer could  
13:44:41 17 testify regarding, in support of, basically, if they  
13:44:46 18 were a Freenet developer were to say what was said in  
13:44:51 19 their recent article, "The Freenet Project Inc" is the  
13:44:56 20 website and for the Freenet developers, that say that  
13:45:02 21 the core pillar of their detection they name is a claim  
13:45:07 22 of 2.3 false positive rate, but this claim is wrong  
13:45:11 23 because they only reach it through many false  
13:45:14 24 assumptions. In other words, that their so-called  
13:45:17 25 verification statistic is inaccurate because it makes

1 USA V. J. LOONEY

13:45:26 2 false assumptions. And I would like an opportunity to  
13:45:31 3 present a witness to testify to that.

13:45:39 4 MAGISTRATE JUDGE PEDERSEN: But I've gotten  
13:45:53 5 the impression that there is no other person besides Dr.  
13:45:58 6 Levine from which you've actually argued who has  
13:46:02 7 actually gotten into the nuts and bolts of the machine  
13:46:06 8 to make this assertion that, no, it doesn't operate in a  
13:46:10 9 way that makes it impossible to determine who the  
13:46:13 10 requester is.

13:46:13 11 MR. NAPIER: That may be true, your Honor.  
13:46:19 12 But, as stated, we believe that there is academic papers  
13:46:25 13 that have been peer reviewed and have been submitted to  
13:46:29 14 the Court, and the Freenet developers themselves that  
13:46:33 15 say this is not the method used by -- that it's a false  
13:46:37 16 method used to determine who a downloader is.

13:46:41 17 MAGISTRATE JUDGE PEDERSEN: So, if there  
13:46:43 18 were false positives --

13:46:44 19 MR. NAPIER: And, quite frankly -- I'm sorry  
13:46:46 20 to interrupt the Court. Quite frankly, I'm not aware of  
13:46:49 21 an academic paper saying that the Levine approach is  
13:46:56 22 valid as far as even share or that requests were  
13:47:00 23 distributed roughly evenly. I'm aware of several that  
13:47:04 24 say that that is not the methodology.

13:47:08 25 MAGISTRATE JUDGE PEDERSEN: When you say

1 USA V. J. LOONEY

13:47:09 2 there are several attesting that that is not the  
13:47:14 3 methodology, do you mean they have experimented as it  
13:47:19 4 appears Dr. Levine has to make that determination or are  
13:47:22 5 they basing that on the developer's assertions that this  
13:47:28 6 is how we designed it?

13:47:35 7 MR. NAPIER: You know what, your Honor, I  
13:47:38 8 believe that we could show through academic papers that  
13:47:41 9 they have experimented and that this method, so-called  
13:47:47 10 Levine method or even share is false.

13:47:49 11 MS. MCGUIRE: I would ask which one, your  
13:47:52 12 Honor, because I've read them all and none of them  
13:47:54 13 falsify the Levine method, which, in contrast, that is  
13:47:58 14 in an academic peer reviewed paper, published not once,  
13:48:03 15 but twice, once in 2017 and 2020. I have read all of  
13:48:05 16 these and not a single one of them said, we tested the  
13:48:09 17 Levine method and it doesn't work. Four or five of them  
13:48:09 18 say we also found ways you could detect downloaders. A  
13:48:09 19 couple of them are by the developers when they were in  
13:48:09 20 their initial developer stage talking theoretically  
13:48:16 21 talking about how they wanted the network to work. But  
13:48:18 22 not one of them says we tested the Levine formula and it  
13:48:22 23 doesn't work.

13:48:36 24 MR. NAPIER: I'm sorry, your Honor. If I  
13:48:38 25 can clarify that. It's my understanding that these

1 USA V. J. LOONEY

13:48:41 2 experts tested how Freenet worked, but not directly  
13:48:46 3 testing the Levine method. Again, it's just that these  
13:48:51 4 experts tested how Freenet works and not directly of  
13:49:02 5 whether the Levine method works.

13:49:04 6 MS. MCGUIRE: And I would submit how Freenet  
13:49:09 7 works, there is a paper that says how it does not work  
13:49:12 8 based on design, again, on the Levine method.

13:49:16 9 MAGISTRATE JUDGE PEDERSEN: Even if we had  
13:49:17 10 an expert in that says, here is how Freenet works and  
13:49:21 11 it's different than how Dr. Levine works, then you would  
13:49:25 12 ask me to conclude, based on that expert testimony, that  
13:49:28 13 Dr. Levine's method is false. But I don't have the  
13:49:32 14 technical expertise to ascertain that.

13:49:36 15 MR. NAPIER: I understand that, your Honor.  
13:49:37 16 And I suppose, you know, I just fall back on the New  
13:49:43 17 York City case. And those, you know, and the three out  
13:49:47 18 of the four cases where the FBI noted it was monitoring  
13:49:52 19 a file of interest, a suspected downloader. I submit  
13:49:56 20 under their own numbers, they don't have a probable  
13:49:59 21 cause for a search warrant to issue because they were so  
13:50:03 22 substantially less than the suspected number of  
13:50:06 23 requests.

13:50:06 24 MAGISTRATE JUDGE PEDERSEN: Then how did  
13:50:07 25 they get past the magistrate judge and the district

1 USA V. J. LOONEY

13:50:12 2 judge?

13:50:12 3 MR. NAPIER: Because they went with the  
13:50:13 4 highest number. And the only thing referred to in the  
13:50:16 5 affidavit was the FBI node that used the biggest number  
13:50:22 6 in support of their position that there was probable  
13:50:24 7 cause. And, you know, so, again, obviously, we're just,  
13:50:28 8 Mr. Looney and I are just left to guess as to if there  
13:50:31 9 were other connected FBI nodes, the government  
13:50:36 10 represents, I didn't know, quite frankly, until today,  
13:50:40 11 that that was the only FBI node connected to Mr. Looney  
13:50:47 12 as represented by the government. But, again, that  
13:50:51 13 didn't seem fair to me, Judge, but it kind of basically,  
13:50:55 14 as far as in that New York City case, that they just  
13:50:58 15 used the highest number when everything else is the  
13:51:02 16 same. These are connected nodes, directly connected,  
13:51:04 17 with a suspected downloader to the FBI, very different  
13:51:08 18 numbers of requests. And I submit, we say this in one  
13:51:14 19 submission to the Court that that was a 75 percent false  
13:51:18 20 positive rate. In other words, that 75 percent of the  
13:51:22 21 cases would not have risen to the level of over the  
13:51:28 22 expected number of requests leading to a conclusion of  
13:51:33 23 probable cause that this person was the downloader.  
13:51:37 24 Seventy five percent of the connected nodes of the FBI  
13:51:43 25 would have led to the conclusion that this person was

1 USA V. J. LOONEY

13:51:46 2 not the downloader of that respective file of interest.

13:51:54 3 MAGISTRATE JUDGE PEDERSEN: I assume that  
13:51:56 4 chart was given to the magistrate judge in the Southern  
13:52:10 5 District?

13:52:10 6 MR. NAPIER: Your Honor, it had, as sent to  
13:52:17 7 the Court, the U.S. Attorney office Bates stamp number  
13:52:21 8 34. And I think that the search warrant affidavit ended  
13:52:27 9 in 33. So, we don't have it attached, other than the  
13:52:31 10 circumstantial evidence, if you will, your Honor, that  
13:52:36 11 it was the 34th page of the warrant affidavit.

13:52:42 12 MS. MCGUIRE: And, your Honor, that is why I  
13:52:43 13 said I have no way of authenticating this. I'm guessing  
13:52:49 14 this is something that the defendant found online.  
13:52:51 15 There are large communities of people who are Freenet  
13:52:56 16 users who are flabbergasted by the fact that the  
13:53:01 17 government can find child pornography on their computers  
13:53:03 18 even though they are using this. And so they started  
13:53:05 19 these hubs where they exchange theories. And I have no  
13:53:11 20 way of authenticating and I can't tell the Court if it's  
13:53:11 21 genuine.

13:53:12 22 MR. NAPIER: It has a Bates stamp on the  
13:53:14 23 bottom. And, again, that does not answer the question.  
13:53:16 24 But, it does, correct?

13:53:20 25 MS. MCGUIRE: It does have a Bates stamp.

1 USA V. J. LOONEY

13:53:23 2 MAGISTRATE JUDGE PEDERSEN: I can add a  
13:53:24 3 Bates stamp to anything.

13:53:26 4 MR. NAPIER: And as I say, your Honor, the  
13:53:28 5 affidavit matches -- the IP address referred in the  
13:53:32 6 affidavit of the Corbett case matches the IP address  
13:53:37 7 referred to in this chart.

13:53:39 8 MAGISTRATE JUDGE PEDERSEN: Then it does beg  
13:53:41 9 the question, how the magistrate interpreted it to  
13:53:44 10 believe there was probable cause.

13:53:45 11 MR. NAPIER: But, again, your Honor, I think  
13:53:47 12 very unfairly, the affidavit itself just referred to the  
13:53:51 13 biggest number. And, perhaps, the magistrate did not go  
13:53:55 14 further than the biggest number in his determination  
13:53:59 15 that there was probable cause for a search warrant.

13:54:05 16 MS. MCGUIRE: Your Honor, I would have to  
13:54:07 17 say I would object to the Court placing any  
13:54:09 18 consideration on this given we have no idea what its  
13:54:13 19 source is.

13:54:17 20 MR. NAPIER: Your Honor, I think, you know,  
13:54:21 21 I think we could certainly give more clarification to  
13:54:26 22 this case. There is no question in my mind that this  
13:54:29 23 chart was connected to the *U.S. v. Corbett* case. And I  
13:54:35 24 believe through the -- even though we obtained it  
13:54:38 25 separately, I believe that the -- it was included as an



1 USA V. J. LOONEY

13:54:42 2 attachment to the search warrant affidavit. But, you  
13:54:47 3 know, I could certainly provide more clarification to  
13:54:51 4 the Court regarding that. And I understand the issue  
13:54:56 5 there, but I certainly believe it to be used in this  
13:55:02 6 *U.S. v Corbett* case.

13:55:04 7 MAGISTRATE JUDGE PEDERSEN: I would assume  
13:55:05 8 had the magistrate judge read the application and seen  
13:55:07 9 that attachment, that she would have questioned the  
13:55:13 10 officer on that and its significance. So I'm guessing  
13:55:19 11 she was never shown it and why, I don't know. And how  
13:55:21 12 it came into your hands, I don't know.

13:55:28 13 MR. NAPIER: Your Honor, if I may, that was  
13:55:30 14 a fellow defense attorney provided the affidavit and who  
13:55:35 15 is doing a similar case that provided the affidavit and  
13:55:39 16 the chart.

13:55:41 17 MAGISTRATE JUDGE PEDERSEN: Okay.

13:55:43 18 MR. NAPIER: As separate documents.

13:55:48 19 MAGISTRATE JUDGE PEDERSEN: Okay. So, you  
13:55:58 20 know, when people move to suppress evidence seized from  
13:56:01 21 a house generally or from a car, we ask for an affidavit  
13:56:06 22 of standing.

13:56:07 23 MR. NAPIER: Yes.

13:56:08 24 MAGISTRATE JUDGE PEDERSEN: In this case  
13:56:09 25 here, I would like something from the defense to show

1 USA V. J. LOONEY

13:56:12 2 that there is an issue of fact that requires an  
13:56:15 3 evidentiary hearing, because, right now, I don't see  
13:56:18 4 that. If you would like to submit something.

13:56:22 5 MR. NAPIER: I appreciate the opportunity,  
13:56:24 6 your Honor.

13:56:24 7 MAGISTRATE JUDGE PEDERSEN: Can you do it in  
13:56:26 8 a week?

13:56:26 9 MR. NAPIER: I can.

13:56:27 10 MAGISTRATE JUDGE PEDERSEN: And, Ms.  
13:56:29 11 McGuire, can you respond within a week?

13:56:30 12 MS. MCGUIRE: Yes.

13:56:31 13 MAGISTRATE JUDGE PEDERSEN: Okay. If I  
13:56:33 14 determine that there is an issue of fact that needs to  
13:56:36 15 have a hearing for its resolution, then I'll schedule a  
13:56:39 16 hearing. Otherwise, I'll issue a Report and  
13:56:42 17 Recommendation to the district judge.

13:56:45 18 MR. NAPIER: Thank you. Your Honor, I would  
13:56:46 19 request, if the government would agree, to briefly  
13:56:52 20 respond to the government's reply to our request for  
13:56:58 21 suppression under the privacy act.

13:57:02 22 MAGISTRATE JUDGE PEDERSEN: Certainly.

13:57:02 23 MR. NAPIER: Privacy act issues and in lieu  
13:57:05 24 of oral argument on that motion.

13:57:10 25 MAGISTRATE JUDGE PEDERSEN: I thought it was

1 USA V. J. LOONEY

13:57:11 2 the government's contention that because this is an open  
13:57:15 3 system, anybody can eavesdrop, if you will, without the  
13:57:19 4 need for an eavesdropping warrant. Is that what we're  
13:57:24 5 talking about?

13:57:25 6 MR. NAPIER: Yes, your Honor.

13:57:26 7 MS. MCGUIRE: Not quite the government's  
13:57:27 8 position. There is an exception in any kind of a  
13:57:28 9 eavesdropping statute where one of the parties consents,  
13:57:31 10 this was an undercover, therefore, it's not  
13:57:35 11 eavesdropping. It would be like doing a controlled  
13:57:40 12 phone call with an undercover on the under end, that is  
13:57:41 13 traditionally not eavesdropping.

13:57:41 14 MAGISTRATE JUDGE PEDERSEN: And that applies  
13:57:42 15 no matter what state we're talking about.

13:57:44 16 MS. MCGUIRE: I don't have an objection to  
13:57:47 17 reply. I ask that we adhere to the page numbers.

13:57:50 18 MR. NAPIER: I didn't hear you.

13:57:51 19 MS. MCGUIRE: I have no objection to a  
13:57:54 20 reply. I ask that we stick with the Court's page  
13:57:59 21 numbers.

13:58:00 22 MR. NAPIER: And how much is that?

13:58:01 23 MS. MCGUIRE: I think it's 15.

13:58:02 24 MR. NAPIER: Certainly, Judge. I was  
13:58:05 25 planning on perhaps a three or four page written

1 USA V. J. LOONEY

13:58:08 2 response to the government's reply regarding that  
13:58:10 3 particular motion.

13:58:11 4 MS. MCGUIRE: No objection.

13:58:12 5 MAGISTRATE JUDGE PEDERSEN: You didn't want  
13:58:13 6 to raise that now.

13:58:14 7 MR. NAPIER: If I could submit that in  
13:58:16 8 writing, I appreciate it.

13:58:18 9 MAGISTRATE JUDGE PEDERSEN: Same time table?

13:58:19 10 MR. NAPIER: Same time table is fine.

13:58:21 11 MAGISTRATE JUDGE PEDERSEN: I'm going to get  
13:58:24 12 something from you. There is an issue of fact and  
13:58:26 13 something from you responding to the Government's  
13:58:31 14 contention this eavesdropper had permission because he  
13:58:34 15 consented.

13:58:35 16 MR. NAPIER: Yes, your Honor. Thank you.  
13:58:36 17 Within a week.

13:58:37 18 MAGISTRATE JUDGE PEDERSEN: Very good.

13:58:37 19 MR. NAPIER: And, your Honor, is your Honor  
13:58:39 20 going to give us another court date? I'll submit within  
13:58:44 21 a week.

13:58:45 22 MAGISTRATE JUDGE PEDERSEN: Right. And Ms.  
13:58:47 23 McGuire is going to submit within a week of your  
13:58:49 24 submission. After which time I'll either set a date for  
13:58:52 25 a hearing or I'll issue a Report and Recommendation.

1 USA V. J. LOONEY

13:58:56 2 MR. NAPIER: Very well.

13:58:57 3 MAGISTRATE JUDGE PEDERSEN: So, the time is  
13:58:58 4 still excluded under the Speedy Trial Act because there  
13:59:03 5 is a motion pending. We're still getting information on  
13:59:05 6 that motion to be able to resolve it. And if we have a  
13:59:08 7 hearing, that will extend things further. When I issue  
13:59:12 8 the Report and Recommendation, if I do, that then you'll  
13:59:15 9 know we're not having a hearing and I should know within  
13:59:18 10 a week or so of, yes, I need a hearing or, no, I don't.

13:59:22 11 MR. NAPIER: Understood. Thank you very  
13:59:24 12 much.

13:59:25 13 Thank you, Ms. McGuire.

14 MS. MCGUIRE: Thank you.

15 \* \* \*

16 CERTIFICATE OF REPORTER

17 I certify that the foregoing is a correct transcript  
18 of the record to the best of my ability of proceedings  
19 transcribed from the audio in the above-entitled matter.

20

21 S/ Karen J. Clark, RPR

22 Official Court Reporter

23

24

25